New Seasons, Inc. *and* New England Health Care Employees Union, District 1199 SEIU.[1] Case 34–CA–10946

February 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 8, 2005, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified and set forth in full below.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, New Seasons, Inc., Manchester, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Failing to continue in effect the terms and conditions of its 2003–2005 collective-bargaining agreement with the Union by, without consent of the Union, changing the existing contract language of that agreement's article 13(L).

(b) Over the objections of the Union, unilaterally implementing changes in article 13(F) of the 2003–2005 collective-bargaining agreement.

(c) Over the objections of the Union, unilaterally voiding the December 2000 settlement agreement between the parties.

2. Take the following affirmative actions deemed necessary to effectuate the policies of the Act.

(a) On request of the Union, bargain collectively with the Union as the exclusive collective-bargaining representative of the Respondent's employees in the unit described below with regard to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an agreement is reached, embody that agreement in a written, signed instrument:

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[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule the administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) and Sec. 8(d) by modifying the language of art. 13(L), a subject that was outside the scope of the existing collective-bargaining agreement's reopener clause, without the Union's consent. We also agree that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing changes to art. 13(F) of that agreement, and by voiding the December 2000 settlement agreement. The Respondent took these unilateral actions at a time when no lawful impasse was possible. See, e.g., *Safelite Glass*, 283 NLRB 929, 940 fn. 3 (1987) (no bona fide impasse possible where employer makes agreement contingent on acceptance of terms beyond scope of reopener clauses), enfd. in part sub nom. *Lear Siegler, Inc. v. NLRB*, 890 F.2d 1573 (10th Cir. 1989). We therefore find it unnecessary to reach the judge's further finding that the Respondent violated Sec. 8(a)(5) by implementing its proposals before bargaining to impasse. See, e.g., *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1235 (1989), enfd. 924 F.2d 1078 (D.C. Cir. 1991).

Though Member Schaumber views this as an extremely close case, he joins his colleagues in finding that the parties' reopener agreement, which was limited on its face to the "Article 13 attendance bonus benefit," did not encompass the general notice requirements of art. 13(L). Reopener provisions are properly narrowly construed to avoid the potential for disrupting bargaining relationships by creating opportunities for renegotiation of terms settled in collective bargaining, simply because one party or the other proves unhappy, after the fact, with the deal struck earlier. Many provisions of collective-bargaining agreements implicate, cross reference, or otherwise relate to other provisions, but that fact alone cannot bring them within the scope of a re-opener provision limited to one specific provision. The credited evidence in this case is, in his view, insufficient to establish that the parties intended the reopener to encompass the separate notice provisions of art. 13(L).

[4] We shall modify the judge's recommended Order to conform to our findings. Because the Respondent unlawfully modified art. 13(L), we shall order the Respondent to rescind the unlawfully implemented changes made to that section, and adhere to the 2003–2005 collective-bargaining agreement. Because the Respondent unlawfully unilaterally changed art. 13(F) and the 2000 settlement agreement, we shall order the Respondent to rescind those unlawfully implemented changes and restore the status quo until impasse or agreement is reached on art. 13(F), and restore the December 2000 settlement agreement and the status quo as it existed prior to the unlawful voiding of the agreement.

The General Counsel has excepted to the administrative law judge's failure to expressly include a make-whole remedy in the decision and order. The General Counsel urges that the restrictive changes that the Respondent implemented to the two contract provisions and its unilateral nullification of the parties' December 2003 settlement agreement may have deprived the unit employees of benefits, including bonus days off, that they would have earned but for the Respondent's unlawful action. We find merit in the General Counsel's exception and will include a make-whole remedy in the modified order for any such losses.

All regular, full-time direct care staff, including day treatment program coordinators, house supervisors, nurse supervisors habilitation specialists I and II, habilitation assistants, dietary/maintenance aides, residential specialists, residential assistants, maintenance specialists, and transportation officers, but excluding the executive director, director of programs and services, administrator on call, director of nurses, business office staff, recreation aides and consultants, staff development coordinator (scheduler), and staff and training coordinator (trainer).

(b) On request of the Union, rescind the unlawfully implemented changes Respondent made to the parties' 2003–2005 collective-bargaining agreement, article 13(L), and adhere to that agreement.

(c) On request of the Union, rescind the unlawfully implemented changes Respondent made to the parties' 2003–2005 collective-bargaining agreement, article 13(F), and restore the status quo until impasse or agreement is reached.

(d) On request of the Union, restore the parties' December 2000 settlement agreement which Respondent unlawfully voided and restore the status quo as it existed prior to the unlawful voiding of the agreement.

(e) Make whole employees in the unit covered by the collective-bargaining agreement for any loss of benefits, including loss of bonus days off, that the employees sustained as a result of the changes in the terms and conditions of employment that the Respondent unlawfully implemented on September 1, 2005.

(f) Within 14 days after service by the Region, post at its office and group homes maintained in and around Manchester, Connecticut, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 28, 2006

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to continue in effect the terms and conditions of our 2003–2005 collective-bargaining agreement with the Union by changing the existing contract language in article 13(L) without the agreement of the Union.

WE WILL NOT, over the objections of the Union, unilaterally implement changes in our 2003–2005 collective-bargaining agreement, articles 13(F) and (L).

WE WILL NOT, over the objections of the Union, unilaterally void our December 2000 settlement agreement with the Union.

WE WILL, on request of the Union, bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the unit described below with regard to rates of pay, wages, hours of em-

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployment, and other terms and conditions of employment and, if an agreement is reached, embody that agreement in a written, signed instrument:

> All regular, full-time direct care staff, including day treatment program coordinators, house supervisors, nurse supervisors habilitation specialists I and II, habilitation assistants, dietary/maintenance aides, residential specialists, residential assistants, maintenance specialists, and transportation officers, but excluding the executive director, director of programs and services, administrator on call, director of nurses, business office staff, recreation aides and consultants, staff development coordinator (scheduler), and staff and training coordinator (trainer).

WE WILL, on request of the Union, rescind the unlawfully implemented changes we made to the 2003–2005 collective-bargaining agreement, article 13(L), and adhere to that agreement.

WE WILL, on request of the Union, rescind the unlawfully implemented changes we made to the 2003–2005 collective-bargaining agreement, article 13(F), and restore the status quo until impasse or agreement is reached.

WE WILL, on request of the Union, restore the December 2000 settlement agreement which we unlawfully voided and restore the status quo as it existed prior to the unlawful voiding of the agreement.

WE WILL make whole the employees in the unit covered by the collective-bargaining agreement for any loss of benefits, including loss of bonus days off, that the employees sustained as a result of the changes we unlawfully implemented in the terms and conditions of employment.

NEW SEASONS, INC.

Margaret A. Lareau, Esq., for the General Counsel.
Lisa S. Lazarek, Esq., of Hartford, Connecticut, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Hartford, Connecticut, on February 23, 2005. The charge was filed by New England Health Care Employees Union, District 1199, SEIU, AFL–CIO (hereinafter Union or District 1199) on September 2, 2004,[1] and the complaint was issued November 30, 2004. The complaint alleges that New Seasons, Inc. (hereinafter New Seasons or Respondent) has engaged in conduct in violation of Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (Act). Respondent filed a timely answer wherein, inter alia, it admits the jurisdictional allegations of the complaint.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a nonprofit Connecticut corporation, with its administrative offices located in Manchester, Connecticut, has been engaged in providing residential and daycare services to mentally-impaired individuals at various sites throughout the Greater Manchester area. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. An Overview and Complaint Allegations

New Seasons operates seven group homes in the Manchester Connecticut area taking care of mentally disabled clients. The Union represents a unit of Respondent's employees described as follows:

> All regular, full-time direct care staff, including day treatment program coordinators, house supervisors, nurse supervisors habilitation specialists I and II, habilitation assistants, dietary/maintenance aides, residential specialists, residential assistants, maintenance specialists, and transportation officers, but excluding the executive director, director of programs and services, administrator on call, director of nurses, business office staff, recreation aides and consultants, staff development coordinator (scheduler), and staff and training coordinator (trainer).

Since about 1992 and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and recognized as such by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from April 1, 2003 to March 31, 2005 (the agreement). Article 31, subsection B of the agreement contains a midterm reopener clause for the purpose of negotiating wages, health insurance benefits, and the article 13 attendance bonus benefit.

The complaint alleges that on or about September 1, 2004, Respondent:

(a) implemented its final proposal modifying the article 13,[3] subsection F attendance bonus benefit; and[4]

[1] All dates are in 2004 unless otherwise indicated.

[2] Respondent filed a motion to correct the transcript dated March 15, 2005. The motion to correct is granted. Counsel filed a similar motion attached as App. A to her brief. Her motion is granted.

[3] Art. 13 in the contract appears as art. XIII. It will be referenced hereinafter as art. 13 for ease of typing.

[4] The parties also had entered into a December 2000 settlement agreement which affected the attendance bonus benefit. Without the approval of the Union, Respondent effectively voided this agreement at

(b) failed to continue in effect all the terms and conditions of the agreement by modifying the article 13, subsection L planned-absence notice requirement.

The complaint alleges that the subjects of Respondent's actions are mandatory subjects of bargaining and that the Respondent took the action set forth above without affording the Union an opportunity to bargain with respect to such actions and without first bargaining with the Union to a good faith impasse. The complaint alleges that Respondent's actions were in violation of Section 8(a)(1) and (5) of the Act. Allegation b above is alleged to be an independent violation of Section 8(d).

B. The Reopener Clause, Pertinent Contract Provisions, and the December 2000 Settlement Agreement

The Respondent and the Union are parties to a collective-bargaining agreement for the term April 1, 2003 to March 31, 2005. In article 31, "Duration," paragraph B, the contract provides for a limited reopener in the third year on three subjects, namely, wages, insurance, and the "Article 13 attendance bonus benefit." Specifically, paragraph B, provides as follows:

> The parties agree to reopen the Agreement for the purposes of negotiating wages, health insurance benefits, and the Article 13 attendance bonus benefit effective April 1, 2004. In the event the parties are unable to reach an agreement, the Union will have the right to strike on or after April 1, 2004.

Article 13 is a lengthy provision with multiple subparagraphs. It deals with accrual and utilization of pool time and related matters. Pool time is defined in paragraph 13(A) as "the general term for paid leaves of absence as defined hereinafter." There are also other definitions set forth in paragraph A. Among them, both "planned absence" and "unplanned absence" are defined. A "planned absence" is defined as "any time off from work which has been approved in advance as set forth in Paragraphs J, K, L and M below, unless otherwise approved by the Executive Director or her/his designee." All other approved time off is considered "unplanned absence." Both planned and unplanned absences require approval of the executive director or his/her designee. However the contract only sets forth the criteria for approval of requests for planned absences, not unplanned absences. In this regard, article 13, paragraph J provides as follows:

> Employee requests for planned absences are subject to the approval of the Executive Director or her/his designee taking into account the wishes of the Employee and the needs of New Seasons. Where there is a conflict in choice of planned absences among Employees, seniority shall prevail.
>
> Article 13, Subsection F reads as follows:
>
> Employees who incur no unplanned absences during any period of three (3) consecutive months shall receive one (1) additional day off with pay. Employees must use or forfeit all such earned paid days off in the same year such days are earned, except that Employees may request pay in lieu of time off for up to fifty percent (50%) of such earned time off each year. Pay for such earned time shall be at the Employee's regular pay rate.

Paragraph F describes the attendance bonus benefit. The first sentence of paragraph F describes how the attendance benefit is earned, and the remainder of the paragraph sets forth how employees either use the earned day or instead receive pay.

There is a disagreement between the parties about whether article 13, paragraph L, is a component of what is called in the reopener clause as the "Article 13 attendance bonus benefit."

Article 13, subsection L reads as follows:

> Except in the case of emergency, as determined by the Executive Director, planned time off requests, for a duration of up to five (5) consecutive days off, must be submitted to the employee's supervisor at least three (3) working days in advance of such requested leave. Except in the case of emergency, as determined by the Executive Director, planned time off requests, for a duration of greater than five (5) consecutive days off, must be submitted to the employee's supervisor at least ten (10) working days in advance of such requested leave. An employee's failure to submit time off requests in advance as set forth above shall result in the denial of such request.

The provisions of a December 4, 2000 settlement agreement which the parties had maintained and applied during the term of the 2003–2005 contract also bear on the application of the attendance bonus benefit. A key provision of the settlement agreement, contained in paragraph 3, states:

> 3. In lieu of the emergency exception language set forth in Article 13, Paragraph L, the parties agree that employees who work less than twenty hours a week will be able to utilize up to 2 incidents of EPL (emergency personal leave) per year. Employees who work 20 hours per week or more will be able to utilize up to 3 incidents of EPL per year. The use of an EPL incident will not disqualify an employee from accruing an earned day under Article 13, Paragraph F. In addition, employees may earn up to 2 extra EPL days (one for each of the first 2 earned days earned in a year.)

There were also relevant provisions in the settlement agreement at paragraphs 4, 5, 8, and 9, which read as follows:

> 4. The parties agree that any practice that may have ever existed pertaining to half-day absences not counting as an unplanned absence is void.
>
> 5. Each EPL day is one instance of absence from work (for whatever period of time.)
>
> 8. With regard to achieving holiday pay eligibility, employees shall not be permitted to us[e] an EPL day on either the day before or after a holiday, except with the approval of the Executive Director, whose discretion shall not be subject to the contractual grievance procedure.
>
> 9. Henceforth, EPLs shall be referred to as "PT." PT stands for personal time.

The following is a synopsis of what appears to be undisputed about the meaning and application of article 13, paragraphs F and L, based on the text of the contract, the settlement agree-

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the same time it unilaterally modified art. 13, pars. F and L. I will find that this action violated Sec. 8(a)(1) and (5) of the Act.

ment, and the practice of the parties as described in record testimony.

Article 13, paragraph F, provides that employees can earn an extra day of pool time, dubbed an "earned day" or "bonus day," if they have not had any "unplanned absences" during any 3-month period. Thus, paragraph F created the potential to earn 4 extra days of pool time in a year. However, the text of the December 2000 settlement agreement, paragraph 3, created a substantial exception to the requirement that employees have "no unplanned absences" in a 3-month period in order to qualify for an earned day. Paragraph 3 accomplished this by replacing the introductory language of contract article 13, paragraph L, which is the paragraph which lays out the rules about the number of day's notice that must be provided for planned time off requests. The introductory clause of article 13, paragraph L contained the possibility of a discretionary exception to those notice requirements, prefacing them with, "except in the case of emergency, as determine[d] by the Executive Director." Paragraph 3 of the settlement agreement replaced that nebulous exception with a concrete one—the EPL day system. In this regard, paragraph 3 provided that full time employees could use up to three incidents per year of "emergency personal leave (EPL days) without being disqualified from accruing an earned day under article 13, paragraph F. Paragraph 3 of the settlement agreement also provided that part-timers working less than 20 hours were only afforded 2 such EPL days.[5] Thus, although the provisions of paragraph 3 of the settlement agreement changed the introductory clause to article 13, paragraph L, and did not actually replace any language in paragraph F, the settlement agreement crafted an important element of the paragraph F attendance bonus benefit by expressly stating that the use of an EPL incident will not disqualify an employee from accruing an earned day.

In unrebutted testimony, Union delegate/employee Monica Tourtellotte described the application of these provisions to the unilateral changes implemented by the Respondent on September 1, 2004. Her testimony is consistent with the plain language of the contract and the settlement agreement and is credited. Hereinafter the involved contract and settlement agreement language used prior to September 1 will be called the old system and the language imposed after September 1 will be called the new system. In this regard, under the pre-September 1 or old system, employees with unexpected situations that would make them late or absent from work could apply their EPL days as a pass, so that an incident of tardiness or short notice absence did not disqualify them from receiving an "earned" or "bonus" day under article 13, paragraph F. She used the same "get out of jail free card" language that was used by Respondent in its opening statement in this case. Thus the EPL days did not create paid extra time off, they simply enabled employees to earn their bonus days even though they had some short notice absences or tardiness. However, if an employee had already used up her/his EPL days on earlier absences, then a short-notice absence would bar the employee from securing an earned day.

Significantly, none of the provisions of the settlement agreement modified the number of days of notice which article 13, paragraph L required employees to give for planned time off requests. The required number of days of advance notice was 3 working days for requests of up to 5 days off, and 10 working days in advance of requests for more than 5 days.

Article 13, paragraph L also set forth the consequences of not meeting the notice requirement. It stated: "An Employee's failure to submit planned time off requests in advance as set forth above shall result in denial of such request."

It is noted that in 2003, during the negotiation of the 2003–2005 contract which contains the reopener provision, the Respondent had proposed to delete article 13, paragraph F and the earned days entirely, but it had never advanced any proposal to change article 13, paragraph L. The parties ended up keeping the same paragraph F provision as had existed in the pre-2003 contract.

As to negotiation of the reopener clause in 2003, Respondent's chief negotiator, Pat McHale, testified that the reopener discussed by the parties in 2003 stemmed from the earned days proposal: he did not tie it to the paragraph L notice provisions. In this regard he testified that "we settled the contract with the agreement to come back and revisit issues such as—including wages, health insurance and the earned day proposal that we had been discussing. Earned day issue." Further, in attempting to explain the purposes of the employer's proposals in 2005, he referred to the preference being "to delete the earned days"; he then testified that "We had long conversations on this in 2003 with the Union. This is why it was the subject of the reopener."

C. The Parties Negotiations and Communications

1. The negotiating sessions

a. Overview

By letter dated December 16, 2003, the Union requested reopening the contract on April 1, 2004. During the period April 27 through July 1, 2004, the parties met on five occasions and negotiated under the reopener provision. As will be detailed below, the bulk of the negotiations up until July 1, 2004 were about wages and insurance, with very limited discussion of the attendance bonus benefit. The employer initially made separate proposals to delete article 13, paragraph F and to modify paragraph L. It is the modifications to the notice provisions of paragraph L that General Counsel contends fall outside of the permissible scope of the reopener provision. The Respondent later orally advanced a package proposal to revise the existing paragraph F to dramatically restrict the earned days (and void the key settlement agreement provisions) and to retain the modified paragraph L as first proposed.

On July 1, 2004, the Respondent presented the Union with what it labeled as its "Final Offer"; in addition to wage and insurance proposals, the offer included the same packaged proposal to change both paragraphs of article 13 as it had advanced orally at the preceding negotiating session. At the July 1 meeting, the parties spent considerable time on wages and insurance,

[5] Although the settlement agreement, at par. 3, provides for earning extra EPL days—as distinguished from extra earned days—there was no testimony explaining just how such could take place. Union delegate and employee Monica Tourtellotte testified that she was not sure how the extra days could be earned.

and actually reached agreement on those issues. Then they turned to the article 13 attendance bonus benefit. After limited discussion on this issue, the parties agreed that the Union would later fax a counterproposal to the Respondent.

b. The Meetings

The first negotiating session pursuant to the reopener request was held April 27, with the following sessions held May 27, June 7, June 15, and July 1. Each session lasted about an hour to an hour and a half. At the first session, the employees were represented by union organizer Carla Montague, Linda Vannoni,[6] and employee/union delegates Monica Tourtellotte and Cecile Winslow. The Respondent was represented by attorney Patrick McHale and its Executive Director Keith Lavallette. The Union presented its proposals which called for a wage increase, a future proposal on health insurance and no change in the attendance bonus benefit. The Union's proposal on health insurance was put off until the Respondent supplied certain requested information. The Respondent made proposals with respect to insurance and as pertinent, article 13. Respondent proposed deleting article 13, paragraph F and modifying paragraph L. With respect to paragraph L, Respondent proposed deleting the opening phrase of the existing provision, i.e., "Except in the case of emergency, as determined by the Executive Director." It also proposed increasing the advance notice required for a request of 5 or less days off from the current 3 working days to 5 "business" days. Specifically, the Respondent proposed substituting the following language for the existing language of paragraph L:[7]

> Planned absences from work requires appropriate advance notice from the employee to the employee's supervisor based upon the requested duration of the absence. For absences from work not to exceed five (5) consecutive days, the employee shall be required to provide her/his supervisor with no less than five (5) business days notice of her/his request for planned time off. For absences from work which exceed five (5) consecutive days, the employee shall be required to provide her/his supervisor with a minimum of ten (10) business days notice of her/his request for such planned time off. An employee's failure to submit planned time off requests in advance as set forth above shall result in the denial of such request.

According to Montague, Respondent's representative stated that the changes proposed in article 13 were to address a scheduling problem. Montague testified that a number of employees who attended this meeting voiced their disapproval of Respondent's proposed changes to article 13. Had the Union accepted the Respondent's proposal both to delete paragraph F and change paragraph L, in addition to losing earned bonus days, the employees would have been faced with significant changes in the notice requirements.

At the next meeting, on May 27, the parties were represented by the same people. The Union made a proposal with respect to health insurance and pensions. Respondent at this meeting proposed changing health insurance providers and provided an overview of the benefits and costs associated with the change. According to McHale, Respondent objected to the pension proposal on the grounds that it was outside the reopener and it was withdrawn. Montague testified that she did not believe there was any discussion of the Respondent's proposal with respect to article 13.

At the next meeting, held June 7, the parties began by talking about the Respondent's financial statement which it produced at this meeting. There was also substantial discussion about health insurance. At this meeting, Montague rejected the Respondent's proposal with respect to article 13.

At the June 15 meeting, there were present representatives from the insurance carrier to make a presentation. With respect to the article 13 proposals, Respondent orally modified its offer. It proposed to keep the earned days in paragraph F, but wanted to do away with the settlement agreement. As noted earlier, this agreement created the emergency person leave system, the EPL days. The proposals were linked in a package, with the Respondent proposing the modified paragraph F provided the Union would be agreeable to the proposed changes to paragraph L. The changes proposed to paragraph L remained unchanged from the April 27 meeting. At this meeting, Montague learned for the first time of the existence of the December 2000 settlement agreement. She asked for a copy of the settlement agreement and was given one. The Union rejected Respondent's oral proposal but made no counteroffer. This meeting lasted about an hour and a half, with about 15 to 20 minutes devoted to the article 13 issues.

At the July 1 meeting, things were a little confused at the start because of some miscommunication between the parties following the June 15 meeting. It was cleared up and the Union stated that the employees had voted to take the Respondent's proposed insurance option 1 without a raise. The employer then presented a handwritten "Final Offer," which correctly stated the parties' position with respect to wages and insurance. It also contained what Respondent had proposed orally with respect to article 13 at the June 15 meeting. This reflected the same language for paragraph L which the Respondent had proposed on April 27, along with a proposal to add to the existing contract's paragraph F the following language:

> To be eligible to receive earned paid days under this Paragraph, the employee must incur *no* unplanned absences during the three (3) consecutive month period. There shall be no exceptions to this requirement. There shall no longer be EPL or PT exceptions and the terms of the Parties 12/4/00 Settle-

[6] I cannot find that Vannoni's position with the Union is set forth in the transcript.

[7] General Counsel urges and I agree that the change in the number of days notice and the type of days counted are significant. For an absence of less than 5 days, employees effectively had to give notice a calendar week ahead rather than the previous 3 working days. The business office is not open on weekends, but only Monday through Friday. It appears that business days would exclude Saturday and Sunday. Thus it appears that a worker wanting to begin five days off beginning on a Monday, would have to give notice on the preceding Monday, rather than the preceding Friday, as was apparently the case previously. The distinction between business days and working days would be particularly significant to patient care workers who only work weekends. The Respondent operates on weekends.

ment Agreement pertaining to such exceptions shall no longer be effective.

The Union accepted the wage and insurance proposals, but rejected the proposal to change article 13. The employees in attendance then spent 10 or 15 minutes voicing their concerns about the proposed changes to article 13. The Union representatives then caucused and determined to make a counterproposal. Montague and Tortellotte then had a side meeting with McHale and Lavalette, advising that the Union would draw up counterproposals, which it would then fax to Respondent. Respondent agreed to this procedure, but stated that it wanted to get rid of the EPL days. Montague testified that she told them that if Respondent did not agree with its counterproposal the sides could meet for further negotiations. According to Montague, both McHale and Lavalette agreed to this procedure.

2. The communications following July 1 and the implementation of changes in article 13

Following up on this agreement, the Union faxed a counter proposal to Respondent on July 12. In the fax, the Union stated that it would not respond to Respondent's proposal on article 13, paragraph L, because it is not a subject covered under the reopener. Montague testified that the Union had never stated that the Respondent's proposal with respect to paragraph L were properly within the scope of the reopener. With respect to paragraph F, the Union's counterproposal reads as follows:

> The Union proposal is to add three (3) more days to the annual accrued pool time for full-time employees and prorated for part-time employees, and delete the current Paragraph F of Article 13 (and the relevant portions of the EPL Settlement dated December 4, 2000[])].

Montague testified that this fax was sent in error. So she called McHale and left a message telling him of the error and promising a corrected version soon. On July 20 a revised counterproposal was sent. It was identical with respect to the Union's position on paragraph L. It modified the July 12 fax with respect to paragraph F. In this regard the revised proposal reads:

> Article 13, Section F—
>
> The Union's proposal is to add three (3) more days to the annual accrued pool time for full-time employees and prorated for part-time employees, and delete the current Section F of Article 13.
>
> Add New Language
>
> In lieu of the emergency exception language set forth in Article 13, Paragraph L, the parties agree that employees who work less then twenty (20) hours per week will be able to utilize up to four (4) incidents of P.T. per year. Employees who work twenty (20) hours per week or more will be able to utilize up to five (5) incidents of P.T. per year.

On the same day as the Union's counterproposal was faxed to McHale, July 20, McHale wrote the Union a letter in response. It first notes the parties' agreement on the wage and health insurance issues. With respect to the article 13 issues, the letter states:

> With regard to the issue of the attendance bonus benefit, New Seasons made its final offer on July 1, 2004 and the Union requested additional time to consider the employer's final offer on this sole remaining issue. Through correspondence dated July 12, 2004, you provided me with the Union's counter to the Employer's final offer on perfect attendance days. This is to advise you that New Seasons has considered the Union's counterproposal and finds it unacceptable. New Seasons' final offer which was distributed on July 1, 2004 concerning the subject of the attendance bonus benefit, and which is attached hereto, remains unchanged. Also, New Seasons disagrees with the Union's new claim that the Employer's proposal to amend Article XIII, Section L is not covered by the re-opener. I note that the parties have bargained about this provision since April 27, 2004 and the Union has never before claimed that this proposal was not within the scope of the reopener. Please let me know promptly if the Union has any other proposals on this issue.

Following receipt of this letter, Montague called Executive Director Lavalette and requested that she and some of the Union employee/delegates have a meeting with him to try to settle the outstanding issue. Lavalette noted that Respondent had given its final offer and said he would speak with Respondent's attorney and would get back with Montague. Montague reiterated her request to meet and asked Lavalette how much money the benefit being affected was costing New Seasons. She received no answer and the conversation ended. She did not hear back from McHale or Lavalette about a further meeting until after Respondent unilaterally implemented its proposals.

At a later date she called Lavalette back and left a message again requesting a meeting. She received no response.

On August 23, Respondent posted a notice to employees in which it announced that it was implementing new rules with regard to article 13. Attached were pertinent pages from the existing contract showing the old language and the new language being implemented. It tracks Respondent's final offer of July 1. It also noted that the new language will become effective September 1, 2004.

By letter of the same date, McHale advised Montague of Respondent's implementation and sent her a copy of the posting to employees. Montague was given no advance warning by Respondent of the posting of notice that it was implementing its proposals concerning article 13.

Upon seeing the memorandum/notice, employee/union delegate Tourtellotte called Lavalette and left a voice message asking how the memo could be issued when negotiations were not settled. She also objected to the change in paragraph L as she felt that matter was not covered by the reopener provision. She received no response to the call, but confronted Lavalette in person the following day. Lavalette told her he had received the message. Tourtellotte asked to talk with him about the memo and Lavalette responded that the matter was being handled by New Seasons' attorney and Montague.

On August 31, 2004 Montague and some delegates hand delivered to Lavalette's secretary a letter dated August 30, which reads as follows:

> It has come to the Union's attention that on August 23, 2004, you notified the employees at New Seasons that you are implementing your final proposal on Article 13, *Attendance Bonus*, effective September 1, 2004[.]
>
> Please be advised that we have not finalized negotiations, and therefore it is illegal for you to implement your proposal. Furthermore, the new paragraph L you intend to implement is not properly a subject of negotiations.
>
> The Union hereby demands that you cease and desist from implementing these proposed unilateral changes. We request confirmed negotiations on these matters.
>
> Please contact me with further dates and times for such negotiating sessions.

On September 2, the Union filed the charge in this case. Prior to implementation of the changes, neither Montague nor any other union representative was given the opportunity to explain the Union's July 20 counteroffer or be informed why the Respondent considered it unacceptable. No one from the Union ever received an answer to Montague's question to Lavalette about what the old system under paragraph F and the settlement agreement was costing Respondent. Before implementation, no one from Respondent offered to meet for additional negotiation over the matters in dispute.

By letter dated September 1, 2004, McHale responded for New Seasons. He wrote

> Your letter dated August 30, 2004 addressed to Keith Lavalette was forwarded to me for a reply.
>
> New Seasons does not intend to refrain from implementing its final offer on the subject of attendance bonus days since, based on the parties' negotiating history, New Seasons believes that the parties are at impasse regarding this issue.
>
> However, New Seasons is certainly willing to meet and negotiate with the Union to the extent that the Union has new proposals to offer on this issue. Representatives from New Seasons would be available to meet with the Union on either of the following dates and times: (dates excluded).

On September 16, Montague responded with a letter which reads:

> I am in receipt of your letter dated September 1, 2004, in which you state that New Seasons does not intend to refrain from implementing its final offer regarding *Attendance Bonus Days.*
>
> A counter proposal had been previously sent to you on July 9 and 12, 2004, which you rejected. The Union is more than willing to meet if you are willing to discuss our new proposals, and not just blatantly reject them without discussion as you have done in the past.
>
> Also, the dates you proposed we meet on are at conflict with my scheduled vacation. Please provide additional dates of your availability following September 28, 2004.

McHale responded with a letter of the same date which reads:

> I am writing in reply to your letter to me dated September 16, 2004. In addition to the dates provided to you previously, New Seasons' representatives would be available to meet with the Union to review any new proposals of the Union on October 4, 6, or 7 at 3:30 p.m. Please let me know if these dates are agreeable to the Union.

McHale sent another letter to Montague, dated September 28, in which he wrote:

> You have not replied to my letter of September 16, 2004 in which I offered the following dates for additional negotiations: October 4, October 6 or October 7 beginning at 3:30 pm. Please be advised that representatives of New Seasons are no longer available on October 7. Kindly advise me as to whether you and your negotiating committee are available to meet on October 4 or October 6 at 3:30 p.m. and if not, please suggest alternative dates.[8]

Since September 1, Tourtellotte has had occasion to request time off. She followed the dictates of the memorandum and requested the time off 5 business days in advance. Previously she could have made the request 3 working days in advance.

On or after September 1, Respondent issued a new "Time-Off Request Form" which includes on its face the critical language found in the newly implemented article 13, paragraph L. It has two check off boxes to reflect disposition of the request. The first reads "APPROVED (adequate accrued time and/or coverage). The other reads "DENIED (no accrued time available, scheduling conflict, inadequate notice). Thus, "inadequate notice" can be fatal to the employee's request. This form contains language reflecting the new, longer number of days notice required, the reference to business days rather than working days, and a definition of business days as excluding holidays or weekends.

According to the unrebutted testimony of employee/union delegate Tourtellotte, employees must submit their planned time off requests under the new time limits of article 13, paragraph L even if they are otherwise ineligible for an attendance bonus by virtue of already having unplanned absences.

III. FINDINGS AND CONCLUSIONS

A. The Employer Violated Section 8(d) of the Act by Implementing Changes in the Notice Requirements of Article 13, Paragraph L

It is undisputed that the Respondent made changes in the notice requirements of article 13, paragraph L without the Union's agreement. The changes were significant—the Respondent increased by 2 days the amount of prior notice that employees had to give for planned time off requests in order to secure approval. Because the changes were in contract provisions not covered by the reopener provisions of the collective-bargaining agreement, and the Union did not agree to the changes, the Respondent's conduct violated Section 8(d) of the Act.

[8] Montague testified that she was on vacation when these letters were received by the Union and was unaware of their existence until they were put in this record.

1. Based on Section 8(d) of the Act, an employer may not impose midcontract changes in contract provisions that are not covered by a reopener clause

Mandatory subjects of bargaining in reopener negotiations are limited to the topics specified in a contract's reopener provision. *Campo Slacks, Inc.*, 266 NLRB 492, 497 (1983). See *Safelite Glass*, 283 NLRB 929 fn. 3 (1987); *Lear Sigler, Inc. v. NLRB*, 890 F.2d 1573 (10th Cir. 1989). As stated in *Campo Slacks*: "In short the parties to a contract need not bargain in midcontract over matters not covered by a reopener clause, *Leveld Wholesale, Inc.*, 218 NLRB 1344, 1349 (1975); *Inta-Roto Incorporated*, 252 NLRB 764, 768 (1980); *Standard Oil Company*, 174 NLRB 177, 178 (1969); and *Los Angeles Marine Hardware Co.*, 235 NLRB 720, 735 (1978)."

Based on the provisions of Section 8(d) of the Act, if a party proposes midterm modifications of the contract beyond the limited topics of the reopener, the opposing party cannot be required to accept those proposals unless it consents to do so. *Campo Slacks*, supra. Section 8(d) defines the obligation to bargain. After setting forth the parameters of this duty, it provides ". . . the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." As stated in *Safelite Glass*, 283 NLRB at 939, ". . . it has been consistently held that an employer acts in derogation of its bargaining obligation under Section 8(d) when during the effective period of the contract and without the consent of the union, it modifies contractually determined benefits or other employment conditions that are mandatory bargaining subjects. [Citations omitted.]"

Further, because parties to a contract need not bargain on such midterm modifications, an impasse in the reopener negotiations is not a defense to an employer's unilateral changes in topics outside the reopener. *Campo Slacks*, supra. The employer cannot avoid the limits of the reopener in the instant case merely by pointing to the fact that the contract provision it wants to change is related in some way to the contract provision that is covered by the reopener. In *Safelite Glass*, supra, the Board found that the Employer violated Sections 8(d) and 8(5) of the Act by insisting on and implementing its proposals on noneconomic aspects of holiday and vacation provisions in contrast to other, economic aspects of those benefits which were arguably encompassed by the wage reopener.[9]

[9] An example of the limits of a reopener can be found in an aspect of this case which is not at issue in this litigation. In this regard, early in negotiations, the Union proposed to reduce the Employer's pension contribution in order to increase the pool of money for wages; it later dropped this proposal. Wages were clearly part of the reopener, but the pensions were set by another contract provision, art. 17. The pension was not transformed into a mandatory subject of the reopener negotiations just because the pension provisions could have an effect on the pool of money available for wages. Rather, the Union's pension proposal was a permissive subject; thus the Union could not have insisted to impasse on this proposal.

2. The reopener provision of the collective-bargaining agreement did not encompass bargaining concerning changes in the notice requirements of article 13, paragraph L

The reopener provision, which is found in article 31 of the contract, was limited to three topics, namely wages, health insurance, and the "Article 13 attendance bonus benefit." The genesis of the attendance bonus resides in article 13, paragraph F, which set up the mechanism for employees to earn an extra day of pool time as a reward for not having unplanned absences. It is undisputed that this benefit was applied in conjunctions with the December 2000 settlement agreement provisions concerning emergency personal leave days, which expressly provided that use of an "EPL" incident did not disqualify an employee from accruing an earned day under paragraph F. Although the settlement agreement also replaced the original introductory phrase to paragraph L concerning exceptions for "emergencies," it otherwise did not affect paragraph L, which sets forth the specific number of days notice that had to be provided when requesting planned absences, and the consequences of inadequate notice, namely the denial of the request.

Although Respondent appears to argue that paragraph L's notice requirements only have import for the attendance bonus and nothing else, in fact the notice requirements do have substantial independent aspects. These independent aspects include those found in paragraph L, itself and in article 13, paragraph J. The independence of paragraph L is also shown by the collective-bargaining history. For example, in the negotiations which resulted in the 2003–2005 contract, Respondent proposed eliminating article 13, paragraph F, without modifying in any respect paragraph L.

a. The text of the agreement demonstrates that the unilateral changes in the notice requirement substantively changed benefits impendent of the attendance bonus benefit

Paragraph L does not mention the attendance bonus benefit. The last sentence of paragraph L, as it existed in the contract both before and after the Respondent's unilateral changes, specifies that: An Employee's failure to submit planned time off requests in advance as set forth above shall result in the denial of such request.

Thus, if an employee did not meet the old notice provisions for planned time off or now does not meet the more stringent requirements of the Respondent's implemented proposal, the request will be denied. On the face of the text of paragraph L, this denial is not an element of the attendance bonus, i.e., the earned day bonus. As Tourtellotte testified without rebuttal, even if an employee is already ineligible for an attendance bonus, he/she must still make the request for planned time off within the new timeframes. In light of this, employees who would like to submit a request for planned time off, but cannot meet the notice requirements, would likely be deterred from doing so, knowing the request will be denied. Thus the Respondent's unilaterally imposed increase in the number of days notice required has direct effect beyond the accrual of extra pool days—it results in denial of the request.

In his testimony, McHale gave his opinion that the Respondent's imposed proposal concerning paragraph L only has rele-

vance vis-à-vis accruing "earned days," and that it has no independent life apart from its application to paragraph F and the attendance bonus benefit. I find this opinion patently wrong. McHale initially stated that if, due to inadequate notice, a request does not qualify to receive designation as a "planned absence," the time off is taken as paid, unplanned time off, which merely excludes the employee from accruing earned days off. Following McHale's reasoning to conclusion, under the unilaterally implemented revised paragraph L, a request for 10 consecutive days off that was not submitted 10 business days ahead of the request would simply be designated as unplanned time off, and granted. Similarly, a last minute request for time off to go to see a ball game would be automatically granted.

On further examination by counsel for General Counsel, McHale conceded that his testimony was limited to his opinion. He further admitted that he did not know how the last sentence of paragraph L, concerning denials of requests, is being interpreted or applied by the Respondent. When pressed further, McHale effectively nullified his initial testimony when he admitted that he could not even describe the effect of a failure to meet the 5-day notice requirement.

The employer never called a witness having actual knowledge to explain its practice under article 1, even though McHale testified that Executive Director Lavalette would know how the "denial" clause of paragraph L was being applied. Thus, Respondent failed to introduce any competent evidence on how it handles requests for unplanned absences. Lavallette or his designee is charged with approving requests for planned absences. As no good reason was given for not calling him to testify, I draw the inference that his testimony would not have been favorable to Respondent, and that his testimony would have shown that denial of a planned leave request affects more than the attendance bonus, and would not have supported the claim that requests for unplanned absences are automatically approved. *International Automated Machines, Inc.*, 285 NLRB 1122 (1987).

McHale's opinion that a denied "planned time off request" is always transformed into an unplanned absence, which is rotely approved, is simply implausible. Planned absence requests are subjected to the criteria of article 13, paragraph J. Paragraph J provides:

> Employee requests for planned absences are subject to the approval of the Executive Director or her/his designee taking into account the wishes of the Employee and the needs of New Seasons. Where there is a conflict in choice of planned absences among Employees, seniority will prevail.

Thus, paragraph J secures a system for approval of planned absences which weighs the wishes of the employee, the needs of the Employer, and in certain cases, seniority. In sharp contrast, the contract provides no criteria at all for approval of unplanned absence requests. It is absurd to think that approval of unplanned absences, even for multiple days, would be automatic. Once again, following McHale's opinion to its logical conclusion would mean that approval for unplanned absences, even if not due to sickness or emergency, would be easier to get at the last second than planned absences submitted days earlier. This is not rational.

The changes to paragraph L have obvious import independent of the earned days and attendance bonus benefit. For example, whereas in the past a top-seniority employee could submit his/her planned absence request for 4 days off just 3 days ahead of time, confident that if there were competing requests he/she would prevail by seniority, he/she now loses out on that seniority right if he/she is unable to meet the new "5 business day" requirement. Thus the more onerous notice requirements of the Respondent's unilaterally-implemented revision of paragraph L strip employees of a contractual benefit apart from the attendance day bonus benefit.

b. The collective-bargaining history establishes that article 13, paragraph L entails independent rights apart from the attendance bonus benefit

The fact that paragraph L has life apart from the attendance bonus is also shown by the collective-bargaining history in both the 2003 contract negotiations and the 2004 reopener negotiations.

In the 2003 negotiations which culminated in the existing contract and its reopener provision, the Respondent made only one proposal concerning the attendance bonus benefit. It simply proposed to delete paragraph F. It made no proposal to change or delete paragraph L, which thus would have retained independent vitality even if paragraph F had been deleted. The Respondent never proposed changing the number of days notice in 2003 in negotiations for the existing contract, nor is there any evidence that this was even mentioned at the table.[10]

In the 2004 reopener negotiations, the Employer's proposal on April 27, which stayed on the table until the fourth session was to delete paragraph F and the earned days entirely, yet at the same time to modify paragraph L. These were initially presented as two independent proposals. Thus, in the Employer's own initial proposals, once again the notice requirements of paragraph L would have life even if the paragraph F attendance bonus was dissolved.

The Employer apparently would have us believe that both the 2003 and 2004 proposal, which retained paragraph L, while eliminating paragraph F were meaningless proposals. That is illogical. One can infer that the proposals had meaning and that paragraph L had independent life. The Employer has not rebutted this inference simply by the statement of opinion of its attorney at trial as to his interpretation of provisions.

In fact, McHale's testimony about the negotiation of the reopener undercuts the Respondent's position that the reopener

[10] There is no evidence that there were actual negotiations about sec. L in 2003 or about sec. L being part of the attendance bonus benefit. No such evidence lies in the miniscule reference to sec. L which appears in the negotiating notes of one session. No such evidence lies in the conclusory, self-serving testimony of McHale, whose memory was clearly not genuinely refreshed by review of that miniscule reference in his notes, that there was "negotiation" concerning par. L. Under any measure, that "evidence" certainly does not constitute parole evidence that the parties intended the reopener to encompass the notice requirements of par. L.

encompasses the notice requirements of paragraph L. He essentially admitted that the reopener discussed by the parties stemmed from the earned days proposal, not the paragraph L notice provisions. In this regard he testified that "we settled the contract with the agreement to come back and revisit issues such as—including wages, health insurance and the earned day proposal we had been discussing. Earned day issue." Further, in attempting to explain the purposes of the employer's proposals in 2004, he referred to the preference being "to delete the earned days" and testified that "We had had long conversations on this in 2003 with the Union. This is why it was the subject of the reopener."

McHale's testimony about the 2004 negotiations further undercuts the Respondent's claim that the reopener encompassed its proposed changes in the notice requirements of paragraph L. Specifically, he testified that the proposed changes in the notice provisions, were so ". . . we can schedule properly." This corroborates the Unions testimony that the Respondent merely cited scheduling needs in justifying its proposal at the bargaining table. Scheduling needs are distinct from the earned day bonus, and they are a concern regardless of whether an employee is eligible for a bonus.

Indeed, McHale's testimony shows that the Respondent packaged its proposed changes to paragraphs F and L as "a signal for where we'd be willing to go to resolve this issue." Just like the Union's proposal to modify the pension benefits to provide funds for wage increases, such a strategy is permitted. However, such a strategic use of a permissive subject, one not within the narrow limits of the reopener cannot be insisted upon to impasse. *Safelite Glass*, supra, at 941–942.

3. Contrary to the Respondent's arguments, changes in paragraph L were not a necessary element of any restriction on the attendance bonus benefit

The Respondent in its opening statement attempted to sweep the notice provisions under the umbrella of the reopener on the "Article 13 Attendance Bonus Benefit" by the claim that ". . . there is no way to deal with the subject of earned days but by referring to Section L," and that its proposals regarding section L "were a necessary component of the reopener clause." The Respondent also contended that the General Counsel was stating that the Respondent could only propose deleting the earned days entirely. I find these statements inaccurate.

In this regard, the Respondent had many legitimate options at the table if it was trying to tighten up the attendance bonus benefit. It could have proposed a variety of approaches, even permissive subjects, so long as it refrained from insisting to impasse on permissive subjects, or implementing them unilaterally if the Union did not agree. It could have made proposals which qualified as mandatory subjects under the reopener. For example, it could have proposed reducing the number of earned days that could be secured by perfect attendance. Indeed, it did lawfully propose eliminating the use of EPL days to avoid disqualifying employees from accruing an earned day under paragraph F.

4. The implementation of changes to paragraph L violated Section 8(d)

In summary, the Employer's change in the notice requirements of section L, specifically its changes in the number of days and their definition as "business days" rather than "working days," represented substantive changes that were not part of the "Article 13 attendance bonus benefit." Therefore this case presents the same situation as in *Safelite Glass*, supra. Here, as in *Safelite*, the Employer, under the guise of introducing a proposal that is part of the reopener, proposed changes in a contractual provision, namely the notice provisions of paragraph L, that contains independent benefits. Here, as in *Safelite*, the employer cannot sweep its proposal on one contract provision into reopener negotiations just because that provision has an effect on a subject encompassed by the reopener. Thus the proposed changes fell outside the limited reopener, and could not be imposed without the Union's agreement. Therefore, the changes violated Section 8(d), and thereby violated Section 8(a)(1) and (5).

B. The Respondent Violated Sections 8(a)(1) and (5) by Implementing its Proposals to Change Article 13, Paragraphs F and L Because the Parties had not Reached Valid Impasse Concerning the Attendance Bonus Benefit

The Respondent prematurely and improperly declared impasse concerning the article 13 attendance bonus benefit and unlawfully imposed its proposals. As a review of the course of bargaining demonstrates, the Respondent cannot meet its burden of establishing impasse.

Even aside from the absence of genuine impasse based on the course of dealing, the Respondent's insistence on including a nonmandatory subject tainted any claimed impasse.

1. Applying well established criteria to the course of bargaining the Respondent did not meet its burden to establish impasse here

Some of the criteria for determining if impasse exists are summarized in a judge's decision recently adopted by the Board in *Mastronardi Mason Materials Co.*, 336 NLRB 1296, 1306 (2001), enfd. *NLRB v. Mastronardi Mason Materials Co.*, 64 Fed. Appx. 271, 2003 WL 1975186 (2d Cir. 2003):

> A genuine impasse in negotiations exists when the parties are warranted in assuming that further bargaining would be futile or when there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *Bryant & Stratton Business Institute*, 327 NLRB 1135, 1144 (1999). 'A genuine impasse in negotiations is synonymous with deadlock. Where there is genuine impasse the parties have discussed a subject or subjects in good faith, and despite their best effort to achieve agreement with respect to such, neither party is willing to move from its respective positions.' *CJC Holdings*, 320 NLRB 1041, 1044 (1996). A lawful impasse may occur where the parties have discussed issues separating them fully and, notwithstanding their best effort to reach agreement are unwilling to move from their positions. *Taft Broadcasting Co.*, 163 NLRB 475 (1967). The burden of proving that an impasse exists is on the party asserting the

impasse. *Outboard Marine Co.*, 307 NLRB 1333, 1363 (1992).

Further, as stated in *Taft Broadcasting*, supra at 478, a determination of whether impasse exists is a matter of judgment, based on a consideration of a number of criteria:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, then length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Subsequent cases have identified other criteria as well. For example, the Board in *Cotter & Co.*, 331 NLRB 787 (2000), stated:

> Another factor that is considered is the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement. See, e.g., *Wycoff Steel*, 303 NLRB 517, 523 (1991). After considering the relevant factors, the Board will find that an impasse existed at a given time only if there is 'no realistic possibility that continuation of discussion at that time would have been fruitful.' *AFTRA v. NLRB*, 395 F.2d at 628 (D.C. Cir 1968).

Common sense judgment, informed by the legal criteria, demonstrates that the parties in the instant case were a long way from impasse. The Respondent was simply impatient with the bargaining process and overeager to implement its proposals, and cut off bargaining midstream. The absence of impasse stands out boldly upon a review of the key facts detailed earlier.

The parties met on only five occasions, and the bulk of the negotiations were about wages and insurance, issues which the parties finally resolved on July 1. Prior to July 1, there had been very limited discussion of the attendance bonus benefit. That discussion consisted of the Respondent initially presenting proposals to eliminate the benefit by deleting paragraph F, and to modify paragraph L, the latter being the disputed proposal which it incorrectly claims to be part of the reopener. Then, on June 15, the Respondent presented a revised, packaged proposal under the heading of "Perfect Attendance Days," which remained on the table on July 1 as part of the so-called "Final Proposal." This was the packaged proposal that the Respondent eventually implemented unilaterally.

Prior to July 1, the Union simply rejected the Employer's proposals, proposing instead that there be no changes to the attendance bonus benefit. Even at the July 1 meeting, the discussion of the parties on this topic was limited, consisting of 10 to 15 minutes of employee comments, the Union's rejection of the proposal and a very short sidebar discussion between the parties. In that brief sidebar discussion, the parties agreed that the Union would send the Respondent a counterproposal, and the Respondent expressed its desire to get rid of the EPL days under the settlement agreement.

On July 20, the Union faxed to the Respondent its first substantive counterproposal on the attendance bonus. At the same time, the Union objected in writing to the Respondent's proposal on paragraph L as falling outside the reopener. The Respondent immediately rejected the Union's counterproposal, without explanation, and advised that its own final offer remained unchanged. The Respondent advised that it disagreed with the Union's objection to the Respondent's paragraph L proposal, but did not explain why.

In response the Union repeatedly sought further negotiations. Its chief spokesperson, Montague, twice orally asked Respondent's Executive Director Lavallette if the union team could meet with him and try to reach some sort of settlement or come up with a counteroffer that would satisfy both parties. She asked how much the involved benefit was costing Respondent. Union delegate Tourtellotte also contacted Lavallette, objected that negotiations were not finalized, and also protested the inclusion of proposals to change the notice requirements of paragraph L.

The Respondent rebuffed all of those requests and contacts, and instead sent the Union a letter declaring impasse and announcing the impending implementation of its last proposals. The Union followed up with a letter requesting negotiations, noting again that negotiations were not finalized, stating that implementation was illegal, and again protesting that the paragraph L proposal was not subject to negotiations. The Respondent continued to ignore the requests for meetings prior to implementation and implemented its packaged proposal, which changed the language of both paragraphs F and L and the related practices.

Considering the criteria complied in *Mastronardi Mason Materials*, supra, and *Taft Broadcasting*, supra, these facts simply do not describe a situation in which the Respondent could possibly have been warranted in assuming that further bargaining would be futile. There was no deadlock. The Union had made only one counterproposal, and had not heard why it was unacceptable. It had not even been told why the Respondent disagreed with its protest to the inclusion of a proposal on paragraph L. It had not been told why the Employer refused to meet. It had not been given in any reasonable detail the reasons why the Respondent wanted its proposals. The Union was doing all it could to meet and understand the Respondent's costs, and come up with a proposal. This then is certainly not a case of the parties having discussed the issues fully, a factor cited in *Taft Broadcasting*, supra. Indeed, the fact that the Union's chief negotiator had been unaware of the existence of the settlement agreement until the next to last bargaining session, and the substantial gaps in the Respondent's chief negotiator's knowledge of the operation of article 13, indicated that in-depth discussion at the table would have provided both parties with a solid basis from which to build agreement.

The parties' dealings on the attendance bonus benefit and on the challenged notice requirements of paragraph L were so cursory that neither side could have know which aspects of those issues were key to the other side—they could not have known "the importance of the issues as to which there was disagreement," another factor cited in *Taft Broadcasting*, supra.

There was no indication that the Union was unwilling to move from its respective position, a criteria cited in *CJC Holdings*, supra. The Union had made only one counterproposal. When the Respondent instantly rejected that counterproposal, the Union gave no indication that it was adamant on the issue—

rather it sought a chance to meet to craft a counterproposal or settlement.

In fact, the history of the parties bargaining in 2004 was that they had demonstrated flexibility and willingness to compromise in an effort to reach agreement, a significant point in finding that impasse has not been reached. See *Cotter & Co.*, supra. In this regard, the parties had reached agreement on two of the three reopener subjects—the difficult subjects of wages and insurance. Indeed, the Union had been the one which moved to accept the Respondent's economic proposal—one of two options packaging wages and insurance advanced by the Respondent early in negotiations. Both the parties had moved on the attendance bonus benefit—the Respondent had dropped its proposal to delete the earned days, and, in its July 20 faxed proposal, the Union had backed off its initial rejection of any changes to the attendance bonus benefit. The Union's July 20 counterproposal was the first substantive change the Union had made, and there was no reason for the Respondent to assume the Union would not consider further changes. To the contrary, there was every reason to assume that the Union was beginning its movement—it was seeking a face-to-face meeting, and expressly worded its request in terms of a desire to craft proposals.

Thus, the parties "did not have a contemporaneous understanding that they were at impasse." See *Cotter & Co.*, supra at 788. In this regard, when the Union learned that the Respondent was rejecting the Union's July 20 faxed proposal out of hand, without explanation, it immediately requested meetings, told the Respondent why it wanted them. Then, when the Respondent proclaimed impasse, it protested in writing and orally that negotiations were not completed and that it wanted to meet to negotiate further. This conduct demonstrates the Union's reasonable belief that further negotiations might produce agreement.

As stated by the Board in *Cotter & Co.*, supra, on similar facts:

> Under these circumstances, an impasse cannot be found, because an impasse can only exist only it both parties believe that they are 'at the end of their rope.' *PRC Recording Co.*, 280 NLRB [615,] 635 [(1986)]; *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982) ('[F]or a deadlock to occur, *neither party* must be willing to compromise'); and *Teamsters Local 639 v. NLRB*, 924 F.2d 1078 (D.C. Cir. 1991).

All the evidence in the instant case points to a continued willingness of the Union to explore compromise with a determination to reach agreement.

To the extent that Respondent argues that it was reasonable to assume that there was no room to compromise in light of a) the character of the Union's July 20 proposal, or b) the absence of any union revised counterproposal after the Respondent rejected the July 20 proposal, those arguments are without merit. The Respondent had not given the Union any reasons for rejecting the Union's July 20 proposal. It had never explained anything about its desire for relief on the attendance bonus benefit beyond its skeletal comment that there were scheduling problems. The Respondent had never explained any pressing needs for the changes in the attendance bonus benefit. What the Union needed was a meeting to understand the Respondent's needs and concerns, and to marshal the information to craft a revised counterproposal that both parties might accept. The Respondent needed to hear alternative solutions. Montague's conversation with Lavalette shortly after the Respondent rejected the Union's July 20 proposal conveyed the need for a free exchange at the bargaining table, in person, as the Act requires.[11]

Here the parties were not deadlocked; rather, "the Respondent's declaration of impasse was premature, and the Union's request for further negotiations a reasonable attempt to reach agreement." *Cotter & Co.*, supra.

The Respondent cannot control the facts and create impasse merely by labeling its July 1 offer as "final," by reiterating in its July 20 letter that its offer remained "final," or by invoking the term "impasse." Indeed, even where one party has asserted that it had reached its final position and the other had not yet offered specific concessions, this does not require a finding of impasse. See *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), and cases cited therein; *Circuit-Wise, Inc.*, 309 NLRB 905, 919 (1992) (statement of company negotiator that parties were at impasse insufficient to establish impasse). The Respondent did nothing to "test the finality" of the Union's position; it did not respond to the Union's in-person inquiries, phone calls, or letters. See *Towne Plaza Hotel*, 258 NLRB 69 (1981) (Employer's failure to "test the finality" of union's position, including returning union's phone calls, was a factor establishing absence of impasse). Here the Respondent simply cut off bargaining when it wanted to, not when true impasse existed.

Respondent's argument that it was not obligated to bargain further because it had asked the Union to submit a new counteroffer, and the Union did not do so, fails. Although the Respondent might have been able to insist on new proposals as prerequisite to meeting if there had been genuine impasse, there was no genuine impasse. Absent a valid impasse, the Respondent could not precondition further negotiations on the Union's willingness to alter its bargaining posture. *A.M.F. Bowling Co.*, 314 NLRB 969, 980 (1994).

Indeed, it is difficult to escape the inference that the Respondent cut off bargaining out of pique when the Union objected to changes in paragraph L as beyond the reopener. The Respondent did not explain to the Union why it considered that the paragraph L notice provisions were covered by the reopener. Instead, the Respondent cut off all bargaining at that point, and ignored the Union's repeated requests to meet. In sum, the parties clearly had not exhausted the collective bargaining process. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), citing *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1235

[11] Sec. 8(d) of the Act specifically provides that the duty to bargain imposes the mutual obligation "to meet at reasonable times." The Board has repeatedly construed this language to require the parties to meet face-to-face for collective bargaining. *Twin City Concrete, Inc.*, 317 NLRB 1313, 1314 (1995) (citing longstanding rule that the statutory obligation to bargain collectively "is not satisfied by merely inviting the union to submit any proposition in writing where either party seeks a personal conference." *Westinghouse Corp.*, 196 NLRB 306, 313 (1972) (face to face meetings are required).

(1989). The Respondent did not satisfy its bargaining obligation by its tardy, post-implementation off of meetings limited to exploring any new proposals the Union had.

2. The bargaining and any claimed impasse were tainted by the Respondent's insistence on a permissive subject, so that there was no valid impasse concerning the attendance bonus benefit

A party can introduce in reopener negotiations a topic that is not included in the reopener; but such would be a permissive subject of bargaining, subject to the constraints of Section 8(d) which were discussed above. A party may not insist to impasse on a permissive subject. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Further, although a party may initially make a proposal on a permissive subject and link it to a mandatory subject as part of an overall package, that linkage does not privilege an employer to "continue to insist upon acceptance of the proposal to the point of impasse, in the face of a clear and express refusal by the union to bargain about the [nonmandatory subject]." *Pleasantview Nursing Home, Inc.*, 335 NLRB 961, 964 (2001), affd. in part, *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747 (2003), quoting *Union Carbide Corp.*, 165 NLRB 254, 255 (1967), enfd. sub nom. *Oil Workers Local 389 v. NLRB*, 405 F.2d 1111 (D.C. Cir. 1968). See also *Servicenet Inc.*, 340 NLRB 1245 (2003) (no valid impasse where party insisted in overall contract settlement on inclusion of nonmandatory subjects). In the instant case, the Union properly put the Respondent on notice that it would not bargain about the permissive subject that was outside the scope of the reopener.

Only a genuine impasse permits an employer lawfully to take unilateral action of a mandatory subject. No genuine impasse is possible in reopener negotiations where substantial cause of the claimed impasse is an employer's insistence that a union accept, as part of packaged contract proposals, a significant modification to existing contract provisions that fall outside the scope of the reopener. *Safelite Glass*, supra, at 941–942.

The Respondent on June 15 orally presented its proposals on article 13, paragraphs F and L as a package, modifying its proposed changes to paragraph F, provided that the Union would be agreeable to the changes in paragraph L. It again presented the proposal as a package in the July 1 written "final offer" under the heading "Perfect Attendance Days." It continued to present them as a package in its August 23 mailing to the Union announcing the impending implementation of the changes to article 13.

Thus, the Respondent presented a package consisting of a mandatory subject—paragraph F, and a permissive subject—the notice requirements of paragraph L. By insisting on this package to what it called impasse, and them implementing the package, the Respondent precluded genuine impasse. See *Safelite Glass*, supra; *Campo Slacks*, supra. Thus, the unilateral imposition of its proposals on the attendance bonus benefit and the notice requirements of paragraph L, independently violated Section 8(a)(1) and (5), in addition to the 8(d) violation discussed earlier.

CONCLUSIONS OF LAW

1. Respondent New Seasons, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, New England Health Care Employees Union, District 1199, SEIU, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in conduct in violation of Section 8(d) and Section 8(a)(1) and (5) of the Act by, over the objections of the Union, failing to continue in effect the terms and conditions of its collective-bargaining agreement with the Union by changing the existing contract language of that agreement's article 13, paragraph L.

4. Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) by, over the objections of the Union, by, without reaching impasse, unilaterally implementing changes in article 13, paragraphs F and L of the collective-bargaining agreement and by voiding the December 2000 settlement agreement between the parties.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent should be ordered to rescind its unlawful implementation of changes to article 13, paragraphs F and L of the collective-bargaining agreement and the voiding of the parties' December 2000 settlement agreement, and restore the status quo as it existed prior to September 1, 2004. Further, Respondent should be ordered to bargain in good faith with the Union and, if an agreement is reached, embody that agreement in a written, signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, New Seasons, Inc., Manchester, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to continue in effect the terms and conditions of its collective-bargaining agreement with the Union by, without consent of the Union, changing the existing contract language of that agreement's article 13, paragraph L.

(b) Over the objections of the Union, without reaching impasse, unilaterally implementing changes in article 13, paragraphs F and L of the collective-bargaining agreement and by voiding the December 2000 settlement agreement between the parties.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative actions deemed necessary to effectuate the policies of the Act.

(a) On request of the Union, bargain collectively with the Union as the exclusive collective-bargaining representative of the Respondent's employees in above described unit with regard to rates of pay, wages, hours of employment and other terms and conditions of employment and, if an agreement is reached, embody that agreement in a written, signed instrument.

(b) On request of the Union, rescind the unlawfully implemented changes Respondent made to the parties 2003–2005 collective-bargaining agreement, article 13, paragraphs F and L, and restore the status quo as it existed before the unlawful implementation.

(c) On request of the Union, restore the parties' December 2000 settlement agreement which Respondent unlawfully voided and restore the status quo as it existed prior to the unlawful voiding of the agreement.

(d) Within 14 days after service by the Region, post at its office and group homes maintained in and around Manchester, Connecticut, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2004.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 8, 2005

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to continue in effect the terms and conditions of our 2003–2005 collective-bargaining agreement with the Union by changing the existing contract language in article XIII, paragraph L without the agreement of the Union.

WE WILL NOT, over the objections of the Union, without reaching impasse, unilaterally implement changes in our 2003–2005 collective-bargaining agreement, article 13, paragraphs F and L.

WE WILL NOT, over the objections of the Union, without reaching impasse, unilaterally void our December 2000 settlement agreement with the Union.

WE WILL, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of the unit employees with regard to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an agreement is reached, embody that agreement in a written, signed instrument.

WE WILL, on request of the Union, rescind the unlawfully implemented changes we made to the parties 2003–2005 collective-bargaining agreement, article 13, paragraphs F and L, and restore the status quo as it existed before the unlawful implementation.

WE WILL, on request of the Union, restore the parties' December 2000 settlement agreement which we unlawfully voided and restore the status quo as it existed prior to the unlawful voiding of the agreement.

NEW SEASONS, INC.